

SUPREME COURT OF QUEENSLAND

[2001] QSC 181
File No 1904 of 1999

BETWEEN:

LARRY JOHN WINDSHUTTLE

Plaintiff

AND:

DARREN WILD

Defendant

AND:

IRENE WILD

as personal representative of the Estate of Darren Wild (deceased)

First Defendant

MOYNIHAN J – REASONS FOR JUDGMENT

DELIVERED ON: 15 June 2001

HEARING DATES: Written submissions

ORDER: **The defendant pay the plaintiff's costs of the action including any reserved costs to be assessed on the standard basis.**

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OUT OF A FUND - When costs allowed out of a fund – Litigation caused by Testator, Executor or Beneficiary – where personal representative continues action defended by deceased testator – whether personal representative liable for costs in that capacity or personally.

COUNSEL: B A Laurie for the plaintiff
G K Flint for the defendant

SOLICITORS: O'Reilly & Lillicrap for the plaintiff
Bickell & Mackenzie for the defendant

- [1] On the 14th December 2000 I gave judgment for the plaintiff in this action declaring he was entitled to be registered as proprietor of certain land and directing removal of a caveat. A direction was given for written submissions as to costs and these were finally received.
- [2] The action was commenced in 1992. Darren Wild, the original defendant, died on 28 October 1995. By that time an order had been made vesting a half interest in the property to the plaintiff. There was a stay on that order pending the trial of this action.

- [3] On 26 July 1996 the solicitors who had been acting for Darren Wild wrote to the plaintiff's solicitors informing them that they acted for Irene Wild, the sole executrix and beneficiary of his estate, and stating to the effect that she would continue the action in that capacity.
- [4] On 9 September 1996 the plaintiff's solicitors responded referring to previous correspondence and noting that the defendant's solicitors are "now acting on behalf of Mrs Wild, the personal representative of the estate". The letter went on to say:

"Order 16 rule 2 required that Mrs Wild in her capacity as personal representative be a party to the action. In the circumstances our client does not require your client to make an application in this regard and will consent to an order at the outset of the trial that Mrs Wild be substituted as defendant.

You will appreciate however that it will be necessary for her to amend the defence to plead the death of Mr Wild and the fact of her appointment, presumably pursuant to the defendant's will, as personal representative of his estate".

- [5] At the commencement of the trial I ordered "Irene Wild as personal representative of the estate of Darren Wild deceased" be substituted as defendant for Darren Wild. A notice of intention to defend was filed on behalf of Irene Wild as executor. The action was then tried to judgment.
- [6] The submissions on behalf of the plaintiff include that Mrs Wild's liability to costs, at least from the date she elected to continue the action, should be borne by her personally.
- [7] It is clear from the record, the relevant parts of which have been set out above, that Mrs Wild was substituted in her capacity as personal representative of the estate of her late son. In that capacity she was entitled to defend the action, the cause of action having survived against his estate pursuant to s 66(1) of the *Succession Act*. She was not a part of the action in her personal capacity and no reason has been shown to found an order against her.
- [8] The proper order for costs therefore is that is the defendant pay the plaintiff's costs of the action including any reserved costs, to be assessed on the standard basis.